No. 14465.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE E. SHIBLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

MANLEY J. BOWLER,
Chief Assistant U. S. Attorney,

JAMES R. DOOLEY,
Assistant U. S. Attorney,

600 Federal Building,
Los Angeles 12, California,

Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES PAGE

RULES

STATUTES

TEXTBOOKS

No. 14465.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE E. SHIBLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.
JURISDICTION.

The United States District Court had jurisdiction of this case by virtue of Title 18, U. S. C., Section 3231; Title 18, U. S. C., Sections 7, 13.

Appellant and Charles Raymond Thompson were indicted on June 25, 1953 for four offenses summarized as follows [C. Tr. 2-6]:[1]

COUNT ONE: Violation of Title 18, U. S. C., Sections 7, 13, and California Penal Code, Sections 459, 460,

---

[1]Reference to Reporter's Transcript is indicated as "R.Tr.," and to Clerk's Transcript of Record as "C.Tr.," and to Clerk's Supplemental Transcript of Record as "Supp.C.Tr." Pagination and lineation, where indicated, are inclusive.

namely, that Thompson entered a building on lands reserved for the exclusive use of the United States at El Toro Marine Air Station in Orange County, California, in the Central Division of the Southern District of California, with the intent to commit larceny therein. Appellant was charged with aiding and abetting Thompson in the commission of this offense [C. Tr. 2].

Count Two: Violation of Title 18, U. S. C., Section 641, namely, that appellant and Thompson, within the Central Division of the Southern District of California, did steal, purloin, and knowingly convert to their own use property of the United States having a value in excess of $100 [C. Tr. 3].

Count Three: Violation of Title 18, U. S. C., Section 641, namely, that appellant and Thompson, within the Central Division of the Southern District of California, did receive, conceal, and retain with intent to convert to their own use and gain property of the United States which had theretofore been stolen from the United States as said defendant then and there well knew, said property having a value in excess of $100 [C. Tr. 4].

Count Four: Violation of Title 18, U. S. C., Section 371, namely, that appellant and Thompson conspired together to:

(a) Enter a building on lands reserved for the exclusive use of the United States with intent to commit larceny therein, in violation of Title 18, U. S. C., Sections 7 and 13, and Sections 459, 460, California Penal Code.

(b) To steal and purloin and knowingly convert to their own use property of the United States, said property having a value in excess of $100;

(c) To conceal and retain with intent to convert to their own use and gain certain property of the United States which had been stolen from the United States as said defendant then and there well knew, said property having a value in excess of $100 [C. Tr. 5-6].

Defendant Thompson entered a plea of guilty to Counts 1 and 4 prior to trial, and Counts 2 and 3 were dismissed as to him [R. Tr. 3-5].

Count 2 was likewise dismissed as to appellant prior to trial [R. Tr. 5-6].

Appellant was tried on Counts 1, 3 and 4 before a jury with the Honorable Ben Harrison presiding [R. Tr. 3-6]. Jury returned verdict finding appellant guilty on Counts 3 and 4 [C. Tr. 91].

Jury failed to return verdict on Count 1 [C. Tr. 91].

Jury found property involved to have a value less than $100 [C. Tr. 91].

On January 25, 1954, Judge Ben Harrison sentenced appellant on Count 3 to one year, and on Count 4 to three years in the custody of the Attorney General, said periods of imprisonment to begin and run concurrently [C. Tr. 179].

Notice of appeal by appellant was filed January 29, 1954 [C. Tr. 180-181].

The United States Court of Appeals has jurisdiction by virtue of Title 28, U. S. C., Section 1291.

II.
APPELLANT'S SPECIFICATION OF ERRORS.

Respondent will take up the specification of errors and argument set forth in appellant's opening brief in the same order as set forth therein:

1. **The Evidence Was Sufficient to Sustain the Conviction of Appellant. There Was Probative and Substantial Testimony to Support the Verdict and Judgment Below. The District Court Did Not Err in Failing to Grant Appellant's Motion for Judgment of Acquittal.**

Appellant has devoted so much space in his opening brief (45 pages) to minimizing the evidence, to drawing every conceivable unfavorable inference from the evidence, to quoting as evidence a vast amount of material which finds no support in the record except from an affidavit made by appellant himself in support of his preliminary motion to disclose the minutes of the grand jury, and to broadside attacks upon the credibility of appellee's witnesses,—that a brief summary of the evidence relied upon by the government and a brief survey of the fundamentals of appellate review of evidence is deemed appropriate.

Witness Robert Huckenpahler testified that in 1952, he was a Corporal in the Marine Corps, stationed at the El Toro Marine Base [R. Tr. 57]; that he was a clerk-typist court reporter and helped write reports [R. Tr. 77]; that he typed matters that came into the Base legal office [R. Tr. 77]; that during the Bennett court-martial proceedings (Nov. 7-25, 1952) he acted as appellant's escort from the "gate" to the legal office inside the Base where the proceedings were being held [R. Tr. 58, 77]; that during the progress of the Court of Inquiry (Dec.

3-12, 1952) he talked with appellant in the men's room in the court building [R. Tr. 58]; that he told appellant if there was anything he (Huckenpahler) could do to help in regards to the Court of Inquiry, or anything that appellant needed, he would be glad to help him [R. Tr. 59]; that appellant thanked him and said there may be a man contact him by the name of Rusty [R. Tr. 59]; that he gave appellant his name, address, and possibly his telephone number [R. Tr. 59]; that shortly thereafter Rusty called him on the telephone and made an appointment to meet him at a drug store in Newport Beach [R. Tr. 60]; that he (Huckenpahler) met this man who identified himself as Rusty (co-defendant Charles Raymond Thompson) and they went to the Shamrock Bar in Costa Mesa [R. Tr. 64]; that at this meeting Rusty told him that he was working for appellant [R. Tr. 65]; that at this meeting Rusty called appellant on the telephone but received no response [R. Tr. 66]; that at this first meeting Rusty inquired about the transcript of the Court of Inquiry and he (Huckenpahler) told him that it had not been completely transcribed at that time [R. Tr. 66]; that three or four days after this meeting Rusty called on him at Huckenpahler's home [R. Tr. 68] and inquired again about the transcript [R. Tr. 68]; that he told Rusty that it was coming along but had not been completed as yet [R. Tr. 69]; that shortly thereafter he (Huckenpahler) talked to Rusty on the telephone and Rusty again asked how the transcript was coming along [R. Tr. 70]; that he told Rusty that it had not been completed yet [R. Tr. 70]; that on the 11th or 12th of December he (Huckenpahler) met Rusty at the Tally-ho Bar in Long Beach and Rusty again asked him when the transcript would be completed [R. Tr. 72]; that he told Rusty that it would be completed in about one week [R. Tr. 72]; that at this meeting, under

his (Huckenpahler's) instructions, Rusty drew a diagram of the legal office, indicating the exact location where the completed copy of the transcript would be [R. Tr. 72]; that at this meeting he (Huckenpahler) told Rusty how to get into the office and where the key would be kept [R. Tr. 72]; that on December 17, 1952, Rusty came to Huckenphaler's home and asked if the transcript would be in the place that he (Huckenpahler) had indicated it would be at their last meeting [R. Tr. 75]; that he told Rusty it would be in the same spot [R. Tr. 75]; that Rusty had a girl with him by the name of Yvonne [R. Tr. 74]; that Rusty showed him identification cards he was going to use to get aboard the Base [R. Tr. 75].

Witness Charles Rusty Thompson testified that approximately the first of December, appellant asked him to contact Corporal Bob Huckenpahler [R. Tr. 115]; that at that time the appellant gave him a card containing the name, address and telephone number of Huckenpahler [R. Tr. 115]; that he called Huckenpahler on the telephone and agreed to meet him at a drug store in Newport Beach [R. Tr. 116]; that after the meeting at the drug store they drove to the Shamrock Bar in Costa Mesa [R. Tr. 116]; that at this meeting Huckenpahler confirmed that he (Rusty) was the person that appellant said would contact him [R. Tr. 117]; that at this meeting they discussed generalities [R. Tr. 117]; that Huckenpahler said he was working in the legal office at El Toro [R. Tr. 117]; that Huckenpahler said "he would like to help me in any manner that he could, in helping Mr. Shibley, because he didn't think that Mr. Shibley had quite got a fair shake" [R. Tr. 117]; that after this first meeting he (Rusty) gave appellant all the information that Huckenpahler had given him at their first meeting and confirmed

the fact that Huckenpahler would still like to help [R. Tr. 118]; that he (Huckenpahler) was working in the legal office and that there were certain records that he had access to, and that he might be able to obtain copies if it would help appellant's case [R. Tr. 118]; that after talking with appellant and within a week he (Rusty) again contacted Huckenpahler at the latter's home [R. Tr. 118]; that at this meeting they talked about the transcript of the Court of Inquiry [R. Tr. 119]; that he (Rusty) talked with appellant about this every day [R. Tr. 120]; that the Sunday before the 19th of December (night of burglary) he and Huckenpahler met at Tally-ho Bar in Long Beach [R. Tr. 120]; that at this meeting, under the directions of Huckenpahler, he drew a diagram showing the rooms in the legal offices and the place where the finished transcript would be located [R. Tr. 121, 122]; that within two hours after this meeting he (Rusty) talked with appellant about this conversation and told appellant that the transcript would be completed at the end of the week [R. Tr. 124]. At this point the court questioned the witness Thompson as to whether or not he told appellant the details and the witness replied, "I am sure that at one time or another, as I stated before, Mr. Shibley and I talked about this case practically every day and I am sure that upon more than one occasion Mr. Shibley and I discussed the exact locations of these rooms in which these documents were being prepared" [R. Tr. 124]. Witness Charles Rusty Thompson further testified that on the night of the 19th of December (night of burglary), shortly after dark, he saw appellant [R. Tr. 124]; that he told appellant that he had been in touch with Corporal Huckenpahler and that it appeared this would be the last night that the record would be available, and that it appeared as though tonight would be the night

[R. Tr. 125, 126]; that appellant asked if he (Rusty) thought they could be gotten and he told appellant "Yes, it appears as though they can" [R. Tr. 126]; that appellant said "Do you have everything pretty well in mind yourself, as to what you are going to do" [R. Tr. 126], and he replied in the affirmative [R. Tr. 126]; that appellant asked him if he had gloves, to which he replied in the affirmative and then appellant said "Well," something to the effect "Don't forget to wear them," or something like that [R. Tr. 126]; that he (Rusty) then went to Huckenpahler's home [R. Tr. 127]; that he then went aboard the Base, entered the legal office and found the transcript in exactly the place designated on the diagram [R. Tr. 128, 129]; that he removed the transcript from the building [R. Tr. 129]; that the next morning he took the records to appellant's home in Long Beach, California, and delivered them to appellant personally, and he (appellant) looked through the transcript at that time [R. Tr. 189]; that appellant told him (Rusty) to get it photostated [R. Tr. 190]; that he (Rusty) made arrangements that same day with Joe Benjocky, owner of Louise's Photo Studio in Long Beach, to do the photo work [R. Tr. 174]; that he told appellant that the photo work would cost $200 [R. Tr. 191]; that after the photo work was completed he took the original stolen copy, the photographic copy and the negatives, and delivered them to appellant at approximately 9:00 A. M. Sunday morning [R. Tr. 175]; that appellant told him "that he (appellant) could not keep them around the house," and "I want you to do this, I want you to take the negatives and mail them back to me, take the reproduction and mail it to my attorney, Dan Marshall, in Los Angeles, and take the original (stolen copy) and mail it to Drew Pierson" [R. Tr. 178]; that on Monday he (Rusty) obtained the $200 cash for

the photo work from appellant's secretary [R. Tr. 192]; that he, with the assistance of one Patrick Fields, mailed the articles as directed [R. Tr. 193]. Rusty Thompson paid Benjocky the money for photographing job [R. Tr. 383]. The articles were mailed as directed—see testimony of Postal Inspector Hudson [R. Tr. 224].

Reference is hereby made to Government's Exhibits 1, 2, 3, and 4, evidencing jurisdiction of the United States of America over the El Toro Marine Air Station in Orange County, California.

Appellate courts will not weigh the evidence nor judge the credibility of witnesses and the universal test accepted on appeal is simply whether there is some evidence competent and substantial before the jury fairly tending to sustain the verdict.

> *C-O-Two Fire Equipment Co. v. United States* (C. A. 9, 1952), 197 F. 2d 489, 491, cert. den. 37 S. Ct. 211, 344 U. S. 892, 97 L. Ed. 690;
>
> *Pasadena Research Laboratories v. United States* (C. A. 9, 1948), 169 F. 2d 375;
>
> *Woodward Laboratories v. United States* (C. A. 9, 1952), 198 F. 2d 995, 998;
>
> *Glasser v. United States,* 315 U. S. 60, 80;
>
> *United States v. Socony-Vacuum Oil Company,* 310 U. S. 150, 254;
>
> *Abrams v. United States,* 250 U. S. 616, 619.

Appellant's contention must necessarily be based entirely upon the question of credibility of witnesses because surely there can be no question in this case as to the sufficiency of the evidence if the jury believed appellee's witnesses. The kernel of appellant's contention, therefore, must be that the testimony of appellee's witnesses, and

principally that of witness Charles Rusty Thompson, is so incredible that as a matter of law it is inherently improbable and therefore this Appellate Court should sit as a trier of fact and so hold.

With reference to this proposition, in addition to those cases cited, *supra,* attention is respectfully invited to *Bridges v. United States* (C. A. 9, 1952), 199 F. 2d 811, reversed by the United States Supreme Court at 346 U. S. 209, after a grant of certiorari limited to the issue of whether or not the prosecution had been barred by the applicable statute of limitations. The case is significant, however, for its lengthy, careful and authoritative discussion of appellate review of sufficiency of the evidence and for its discussion of the attacks launched by the appellants against appellee's witnesses for their alleged bias, interest, inconsistent testimony, etc. (842-843). As to such consideration, the court held:

> "All of these matters were brought out on cross-examination and developed at great length during the trial. They were the subject of much argument by counsel for appellants at the time the case was argued to the jury and of course they are matters in respect to which the jury was the final judge."

In *Bridges, supra,* appellants also contended that certain evidence was inherently improbable. To this contention the court replied:

> "The question whether these events did or did not occur was typically one for the jury. In general this case presents no circumstances different from those which constantly appear where the testimony of witnesses is sharply in confiict. The special function of the jury in our system is to deal with such matters. No Appellant Judge is ever in a position to reconstruct for himself from a printed record the

multitude of things which bring conviction to the juror's mind—the demeanor of the witness, his apparent candor or evasiveness, his assurance or hesitation and even his facial expressions or the sound of his voice." (199 F. 2d at 839.)

On this proposition the United States Supreme Court in *United States v. Oregon Medical Society,* 343 U. S. 326, 339, stated it thusly:

> "As was aptly stated by the New York Court of Appeals, although in a case of a rather different substantive nature: 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which the Appellate Judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth * * *. How can we say the judge is wrong? We never saw the witnesses * * *. To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' (*Boyd v. Boyd,* 252 N. Y. 422, 429, 169 N. E. 632, 634.)"

In his brief appellant seems to concede the above mentioned principles when he states,

> "The ensuing discussion is not intended to entrench upon those legal principles which limit appellate review of jury verdicts. The contention here is that the evidence in this case fails to meet the very standards which govern review of the evidence by courts of the United States in order to prevent a miscarriage of justice" (App. Op. Br. p. 19).

It is difficult to determine with any degree of certainty just what the appellant means by this last statement. It is not unreasonable to conclude that he concedes

no legal grounds to urge reversal in the face of the firmly established legal principles governing Appellate review of jury verdicts; however, he blandly asserts that a miscarriage of justice has occurred in this case and therefore this court should reverse the judgment.

Appellant is engaging in circuitous reasoning in that there is only one way a miscarriage of justice could have occurred in this case which would be that the jury happened to believe appellee's witnesses, which takes us back to the proposition of credibility of which the jury was the final judge.

Appellant, in support of his contention that the evidence was not substantial, lacks sufficient rational probative force to justify submission to the jury in finding of guilt beyond a reasonable doubt, cites three 9th Circuit cases: *Mazurosky v. United States,* 100 F. 2d 958; *Muyers v. United States,* 89 F. 2d 784, and *Kuhn v. United States,* 26 F. 2d 463, all of which are not applicable to the problem here involved in that, without exception, the Appellate Court in each case, in holding that there was "no evidence" upon which to base a guilty verdict, gave *full* weight to the evidence and *full* credence to the witnesses. In other words in those cases, contrary to the wishes of the appellant in this case, the Appellate Court did not sit as a trier of fact, weighing the evidence and judging the credibility of witnesses.

Research has failed to disclose and appellant has cited no cases from this Circuit where this court has ever weighed the evidence or judged the credibility of wit-

nesses, but on the contrary this court has strictly adhered to the general rule on many occasions, its most recent expression on this subject in addition to those cases cited, *supra*, being *Adelman v. United States* (C. A. 9, 1954), 216 F. 2d 541. There may be isolated exceptional cases in other Circuits but in view of the universally established principle, and particularly in view of this court's strict adherence thereto, further comment under the circumstances is not deemed appropriate.

Appellant emphasizes with great zeal two minor inconsistencies in the testimony of appellant's witness, namely, the precise time the money was paid by Thompson to Benjocky for the photographic work, and the time arrangements were made by Thompson with Benjocky for such work. (App. Op. Br. pp. 45-48.) It must be remembered that these witnesses were testifying to events which occurred one year prior to their testimony in court and, further, that discrepancies are more likely to appear in regard to the testimony of a candid witness than in that of an astute perjurer. In any event, such conflicts as stated in the *Bridges* case, *supra,* were fully exploited by counsel before the jury and concerning which the jury was the sole judge.

Appellant in his argument in support of his contention that the evidence is insufficient to support his conviction has made an almost scurrilous attack upon the credibility of the government's principal witness, Thompson, but in view of the firmly established principles above set forth, a reply to such statements from a legal standpoint is not

deemed appropriate nor necessary, however, in the interest of fair play we feel it to be just and proper for us to briefly set the record straight, thereby exposing this ignominious attempt to destroy Thompson without support in the evidence.

(a) *Rusty Thompson's self interest was plain and his motive for falsifying clear* (App. Op. Br. p. 18). This has no foundation in the record. At the time of his testimony in this case he had already pleaded guilty to two felony counts and was awaiting sentence by District Judge Harrison [R. Tr. 186]. There is no evidence that he was promised probation, lesser sentence or anything else. Appellant's counsel propounded no questions to Thompson concerning this subject matter. The record discloses that Thompson was confined five or six months in jail prior to trial and was released O.R. only after appellant sought another continuance [R. Tr. 185-6]. There is no evidence indicating any bias or prejudice against appellant.

(b) *Rusty Thompson was a person of sordid and unsavory character* (App. Op. Br. p. 19). Thompson pleaded guilty to two felony counts in the present indictment but there was no evidence that he had ever been convicted of any previous crime in his lifetime. He served in the Marine Corps from 1942 to 1946 [R. Tr. 130]; he re-enlisted in the Marine Corps in 1950 [R. Tr. 131]; he graduated from United States Naval Air Station at Pensacola, Florida [R. Tr. 131]; he was a fighter pilot [R. Tr. 131]; he flew overseas in combat as a Technical Sergeant [R. Tr. 131]; he was honorably discharged from the Marine Corps in 1946 [R. Tr. 165].

2. Denial of Appellant's Motion for New Trial Based Upon Newly Discovered Evidence Was Not an Abuse of Discretion.

Appellant, on page 82, line 24 of his opening brief, has accused government counsel of a grave offense, namely, suppression of evidence. Before discussing the legal aspects of appellant's motion we ask permission of the court to meet this charge and clarify the record in respect thereto and, in addition, bring into focus the testimony which shows indubitably that Yvonne Fuller, during the trial, was not only known to appellant but was available to him as a witness.

Before commencement of the trial, counsel for the government had in his possession a written statement of Yvonne Fuller [see photostatic copy, C. Tr. 176]. Upon an examination of this statement in preparation for trial, it was apparent that Yvonne Fuller,—if she were to testify in accordance with said statement,—would tend to corroborate the testimony of witness Rusty Thompson in three material respects, namely, (1) that in December, she heard Rusty and Mr. Shibley talk about the Bennett case and about needing some papers from El Toro [C. Tr. 176]; (2) that the second time she went with Rusty to Bob's (Huckenpahler's) home (night of burglary) Rusty said "he was going to El Toro and get the papers George needs" [C. Tr. 176]; (3) that she saw Rusty hand the papers he got from El Toro, to George, and they went into the bedroom [C. Tr. 176].

In accordance with established practice, Yvonne Fuller was brought to the office of government counsel from the Ventura School for Girls, a state institution for juvenile delinquents, for interview in the presence of Deputy U. S. Marshal Bazar [C. Tr. 170]. Before any

questions were asked of her, she stated that she would not testify against George Shibley [C. Tr. 166, line 14]. She was thereupon informed by government counsel that the court would have to decide that question, and unless she refused to testify on a valid constitutional ground the court could hold her in contempt [C. Tr. 166, line 16]. She then stated she was a minor and was already in custody and that she would, under no circumstances, testify against appellant, whereupon she was excused [C. Tr. 166, line 19].

At the trial government witness Huckenpahler testified that on the night of the burglary a girl by the name of Yvonne was with Rusty [R. Tr. 74, line 14].

Appellant's counsel in his cross-examination of the government's next witness, Thompson, instead of making direct inquiry about Yvonne inferred by his questioning that she was a possible narcotic addict [R. Tr. 171, 172]:

> "Q. Now on December 19th you told us that you dressed up in your Marine uniform and you went over—you went to the Base and you took a copy of the transcript, is that right? A. That is correct.
>
> Q. On that night were you sober? A. I was.
>
> Q. Had you any type of narcotic? A. I did not.
>
> Q. Were you alone? A. When I went on the Base I was alone.
>
> Q. Before you went on the Base? A. I was in the company of a young lady prior to the time I went on the Base.
>
> Q. Were there any narcotics in the group? A. There were not.
>
> Q. Was the lady a known narcotic addict? A. To my knowledge, no.

Q. Well, you hesitate, do you mean she was or she was not. A. I mean I have heard some people say that she has taken narcotics.

Q. On this particular evening did you take narcotics? A. I did not.

Mr. Bowler: I am going to object to this line of interrogation. The girl, whoever she was, is not on trial and that has no bearing on the issues involved here. I object to it as immaterial and not proper impeachment."

After appellant's counsel had created the atmosphere that Thompson was out with a possible narcotic addict he dropped the subject and made no further inquiry, at which time government's counsel on re-direct examination of Thompson developed that the girl's name was Yvonne Fuller and that she was living in the home of appellant, as follows [R. Tr. 188]:

"Question by Mr. Bowler: Mr. Thompson, this girl that you apparently were with on the night of the 19th, referred to by Mr. Ball here as being a possible narcotic addict—do you know where she was living on the 19th of December? A. On the actual night of the 19th, no, but I will say that two weeks prior to that, I would know where she was living.

Q. Where was she living at that time? A. At Mr. George Shibley's house.

Q. And did you pick her up there that night? A. I think that I did.

The Court: Don't you know?

The Witness: No sir, she moved about that time and I am not sure whether I picked her up there or not.

Question by Mr. Bowler: Was she living at the Shibley house at the time you were staying there intermittently? A. That is correct.

Q. What is her name? A. Yvonne Fuller."

Then, on recross-examination of witness Thompson appellant's counsel persisted, still without mentioning her name, in pursuing a certain line of inquiry looking toward an explanation of the relationship between appellant and Yvonne Fuller, until stopped by the court as follows [R. Tr. 195, 196]:

"Question by Mr. Ball: Mr. Thompson, this lady whom you say you were with that night, the night of the 19th, that little girl was a little girl that had been paroled to Mrs. Shibley, the young lady sitting right here in front of me, by the Youth Authority of this State.

Mr. Bowler: That is objected to as calling for a conclusion of this witness.

The Court: I don't think that is proper, counsel, you must remember there is only one person on trial in this case now.

Mr. Ball: That is correct. Let me say this—that little girl was working as a maid in that home.

The Court: Let's not discuss her.

Mr. Ball: But he tried to bring out she was living there in Shibley's house. We want to show the situation.

Mr. Bowler: You can't show it by this witness. You might be able to show it by other witnesses.

The Court: Is she here?

Mr. Bowler: She is available, Your Honor, and we will have her here.

Mr. Ball: I won't pursue the question then.

The Court: I think you are getting on dangerous ground, counsel.

Mr. Ball: But I didn't want to leave any inferences at all. I won't pursue it, Your Honor; if Your Honor thinks it is immaterial, I won't go into it."

Pursuant to the court's inquiry and statement of government counsel, Yvonne Fuller was present and available in the United States Marshal's Office in the Federal Building each day during the trial [C. Tr. 166, line 24].

From the above quoted testimony it is apparent that there was no effort by government counsel to suppress evidence or secret this witness whose identity was brought out at the trial under his questioning of the witnesses and, further, was made available by him to appellant each and every day during the trial.

We now approach a brief discussion of the legal principles here involved. In general, a motion for a new trial based upon newly discovered evidence is looked upon with distrust and disfavor.

Casey v. United States (Cir. 9, 1927), 20 F. 2d 752, 754;

Nilva v. United States (C. A. 8, 1954), 212 F. 2d 115, 124.

The Court of Appeals will not substitute its judgment for that of the trial court where the latter did not act arbitrarily, capriciously or upon any erroneous concept of the law.

Gage v. United States (C. A. 9, 1948), 167 F. 2d 122, 125;

Joyce v. United States (Cir. 9, 1924), 294 Fed. 665.

The basic requirements establishing testimony of witnesses as newly discovered evidence are stated in *Johnson v. United States* (Cir. 8, 1929), 32 F. 2d 127, 130:

> "There must ordinarily be present and concur, five verities, to wit: (a) the evidence must be in fact newly discovered, *i. e.,* discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such a nature, as that on a new trial, the newly discovered evidence would probably produce an acquittal."

See: *Brandon v. United States* (C. A. 9, 1951), 190 F. 2d 175, 178.

(a) Was the Testimony of Yvonne Fuller Newly Discovered in the Legal Sense?

In order for evidence to be newly discovered so as to authorize a new trial the evidence must have been discovered since the trial. In other words, the evidence obtained after the trial must have been *unknown* and *unavailable* to the appellant himself at the time of trial. As stated in *Fogel v. United States,* 167 F. 2d 763, 765 (C. A. 5, 1948), reversed on other grounds, 335 U. S. 865, 93 L. Ed. 411:

> "The rule has long been established that evidence obtained after trial, in order to be newly discovered in a legal sense, must have been unknown and unavailable to the defendant at the time of his trial."

Here the appellant at time of trial not only had knowledge of the identity and whereabouts of Yvonne Fuller but, in addition, had knowledge that she was with Rusty Thompson on the very night the burglary was committed. Since the trial and conviction the activities of this night

were set up in her affidavit and submitted by appellant as newly discovered evidence.

In the case of *Coates v. United States* (C. A. D. C. 1949), 174 F. 2d 959, relied upon by appellant, it was clearly shown that the witness was *unknown* and *unavailable* at the time of trial. Likewise, the cases of *Hamilton v. United States* (C. A. D. C., 1943), 140 F. 2d 679, and *Griffin v. United States* (C. A. D. C., 1950), 183 F. 2d 990, 336 U. S. 704, 93 L. Ed. 993, also cited by appellant, are again distinguished by the fact that the evidence in those cases was *unknown* and *unavailable* to appellant at the time of trial.

For some apparent reason best known to appellant he refused to take advantage of the opportunity afforded him at the trial to call a witness whose identity was made clear, whose availability was made certain and whose relationship to the activities of Thompson on the very night of the burglary was abundantly apparent at the time of trial.

The court will not allow the appellant a "second guess regarding trial tactics."

> *United States v. Malfetti,* 117 Fed. Supp. 468, affirmed (Cir. 3) 213 F. 2d 728.

(b) The Testimony of the Affiant Yvonne Fuller Is Not Newly Discovered in the Legal Sense, It Being Merely Impeaching Evidence.

The purpose and nature of the affidavit by Yvonne Fuller is best explained by counsel for appellant himself in his presentation of the affidavit to the trial court at the time of his motion [R. Tr. 584].

> "Now since the trial we have discovered that there was a witness available who would contradict him

(Thompson) in material particulars; in other words, would state that on two or three instances where he made a statement that he told an untruth and we filed the affidavit of Yvonne Fuller with Your Honor."

In *Kramer v. United States* (Cir. 9, 1945), 147 F. 2d 202, 204, the general rule is stated that in newly discovered evidence merely intending to impeach or to lessen, but not to destroy the credibility of the witness, is not ground for a new trial.

Appellant relies on *Benton v. United States* (C. A. D. C.), 188 F. 2d 625, as establishing a rule with regard to a motion for new trial based upon newly discovered evidence; however, that was an exceptional case involving the testimony of a twelve-year-old child and the court reversed in the interest of justice and not on the basis of newly discovered evidence, the court stating the basis for its ruling as follows:

At page 627—

"The motion for a new trial having been filed within five days after verdict, it need not be treated as grounded upon newly discovered evidence and judged by the standards applicable to motions so grounded * * *, and special factors to which we have referred are adequate to bring this case within the provision upon which we rely." (Rule 33, permitting a new trial, if required in the interest of justice.)

In conclusion it must be remembered that in considering appellant's motion for a new trial based upon newly discovered evidence, the trial court had before it three *statements* from this vacillating young lady; the statement heretofore referred to, in possession of government

counsel at trial [C. Tr. 176]; the affidavit relied upon by appellant as newly discovered evidence [C. Tr. 145]; and a third affidavit made only *three* days after the one relied on by appellant [Supp. C. Tr.], all of which are inconsistent in material respects.

On the basis of the law and the facts, one cannot conclude that the trial judge acted arbitrarily, capriciously or upon any erroneous concept of the law when he denied appellant's motion for new trial on the ground of newly discovered evidence.

3. The District Court Did Not Err in Excluding Certain of the Evidence Offered by Appellant to Establish Absence of Motive to Commit the Offenses Charged in the Indictment.

(a) Motive in the Instant Case Was Only a Circumstance to Be Considered by the Jury.

In order that appellant's objections may be viewed in proper perspective, the evidentiary value of motive in the instant case should be considered. In the court below appellant sought to show that the entire transcript of the Court of Inquiry "was a public record of a proceeding which he would have been entitled legally and in due course to receive, inspect, copy and retain, that he knew this and had no motive to arrange for its theft" (App. Op. Br. p. 93). While appellant uses the word "knew", in view of the issue of law involved, it is submitted that "believed" more accurately describes the state of mind sought to be established. Appellant's belief therefore, or absence of motive, is the state of mind toward which the offered evidence was directed.

Motive, however, is not an essential element of a crime. The prosecution is under no duty to establish

motive, nor is lack of motive, if established by the defendant, a defense. (*Pointer v. United States,* 151 U. S. 396, 413-416 (1894); *O'Leary v. United States,* 160 F. 2d 333, 335 (C. C. A. 9, 1947); Wigmore on Evidence, Third Edition, §118; 22 C. J. S., Criminal Law, §31.)

Nor is motive, in its true meaning and as it pertains to the case at bar, a "constituent element in the proof of unlawful intent," as appellant contends (App. Op. Br. pp. 92-93). Belief that one has a legal right to commit an act may in some cases negative the required intent to commit an offense (See, *Morissette v. United States,* 342 U. S. 246 (1952)); but when "motive" is employed in this sense, it generally means the good or bad faith *with which an act is committed,* or the *reason or grounds for its commission.* (See, Wigmore on Evidence, Third Edition, §119, for a discussion of some of the loose popular senses in which the word "motive" is used.) Evidence of appellant's belief, however, was admissible only for the purpose of rendering it less probable that he committed the crimes charged (Wigmore on Evidence, Third Edition, §§117, 118.)

The cases relied upon by appellant therefore are distinguishable from the case at bar. In those cases, the state of mind sought to be established *would have negated an essential element of the crime charged.* For example, in *C.I.T. Corp. v. United States,* 150 F. 2d 85 (C. C. A. 9, 1945), the crime charged was conspiring to cause to be made an instrument knowing the same to be false and for the purpose of influencing the action of the Federal Housing Administration. Knowledge of falsity and an intent to use the falsehood for such influence were essential elements of the crime, and evidence offered tended to show that appellant did not have the necessary

knowledge and intent. Similarly, in *Hersh v. United States,* 68 F. 2d 799 (C. C. A. 9, 1934), and *Miller v. United States,* 120 F. 2d 968 (C. C. A. 10, 1941), an intent to defraud was an essential element of the crimes charged, and the state of mind sought to be proved, if established, would have prevented conviction.

In the instant case, however, even if appellant "believed" that he had a legal right to inspect, copy and receive a copy of the transcript of proceedings before the Court of Inquiry, the jury was nonetheless free to find that appellant had the intent and guilty knowledge required to commit the offenses of which he was convicted. As Mr. Justice Harlan observed in *Pointer v. United States, supra* (p. 414):

> "* * * The absence of evidence suggesting a motive for the commission of the crime charged is *a circumstance* in favor of the accused, to be given *such weight as the jury deems proper;* but proof of motive is *never indispensable.*" (Emphasis added.)

In the instant case, therefore, the presence or absence of motive was only a circumstance to be considered by the jury, together with all the other facts and circumstances of the case. The District Court recognized this, and did not prevent appellant from establishing lack of motive [R. Tr. 312]. The court, moreover, properly and adequately instructed the jury as to the weight to be given this evidence [R. Tr. 476-477].

(b) The District Court Properly Excluded the Testimony of Mr. Marshall to Show Motive.

The court below did not err in excluding testimony of Mr. Marshall as to the advice he gave appellant concerning his legal right to obtain a transcript of pro-

ceedings before the Court of Inquiry [R. Tr. 275-276, 282]. Nor was it error to exclude the telephone conversation between Mr. Marshall and appellant in which Mr. Marshall informed appellant that he had examined a portion of the transcript in the office of the United States Attorney. This testimony, if relevant at all, was only relevant to establish appellant's belief concerning his legal rights to inspect, copy, and obtain a copy of the transcript.

While one may testify as to his own belief, when material and relevant (*Buchanan v. United States,* 233 Fed. 257, 259 (C. C. A. 8, 1916), the admissibility of the testimony of others as to what they told the person whose belief is to be established is discretionary with the trial court, especially where such belief is itself only circumstantial evidence. This court in *Finn v. United States of America,* No. 14,479 (C. A. 9, Jan. 7, 1955—not yet reported), commented upon the precise question here involved:

> "It is to be pointed out that the trial court almost without restriction let the defendants testify as to what they 'thought.' However, the pattern of its rulings was generally to exclude documents, papers and statements of others made to the Finns that would have tended to show how they happened to think the way they said they thought. Such collateral matter is ordinarily inadmissible and wisely so."

Here, too, appellant was permitted to testify without restriction as to his belief [R. Tr. 316-319, 344-345]. However, in view of the fact that appellant's belief was itself only circumstantial evidence, the testimony of Mr. Marshall which might tend to establish such belief becomes extremely remote. The danger of admitting such

testimony is emphasized when it is considered that one's belief may be the result of conversations with hundreds of persons. Where testimony of a collateral nature is offered, and its relevancy is slight, its admissibility rests largely within the discretion of the trial judge.

Schindler v. United States, 208 F. 2d 289, 290 (C. A. 9, 1953), cert. den. 347 U. S. 938;

Randle v. United States, 113 F. 2d 945 (C. A. D. C., 1940).

Assuming, however, that an attorney may in some cases testify as to the information and advice he gave his client, the testimony offered in the court below had no probative value, since *the record contains no evidence that appellant relied upon the information received from Mr. Marshall in forming his alleged belief.* Indeed, upon cross-examination, appellant made it manifestly clear that his belief was based, not upon information received from Mr. Marshall, but upon his own research into the matter [R. Tr. 344-345]:

"Q. Now, tell me this. You had an interest in this transcript. It was important to you. What did you base your opinion on as a lawyer that entitled you to the full transcript of the proceedings before the Court of Inquiry. Just name them. A. I based it upon the *common law military as I understand it.*

Q. I am talking about the new military code as you know. A. The common law military is part of the new military code and has been expressly declared so to be by the Court of Military Appeals and by the boards of review.

Q. Give us the section that you relied upon in forming your opinion, if you will. A. The specific thing that I refer, to, Mr. Bowler, is a section or quotations in the law relating to the United States Navy. I think it was 1921, the first edition which

> I inherited from John J. Monahan, God rest his soul, in which was said that *these transcripts are public records and it is against the spirit of the country to deny any civilian access to them.*" (Emphasis added.)

A comparison of the above-quoted testimony with the offer of proof made by appellant [R. Tr. 282-283] discloses that appellant not only arrived at his supposed belief independent of information received from Mr. Marshall, but also that appellant's belief differed materially from the advice of Mr. Marshall. In his offer appellant sought to show that Mr. Marshall "advised Mr. Shibley that *if proceedings were filed against him* in the Federal Court for contempt of the Court of Inquiry that he would be entitled to a transcript of the proceedings" [Emphasis added; R. Tr. 282-283]. As indicated from the above quoted testimony, appellant based his belief upon his contention that "these transcripts are public records."

Moreover, at the time the testimony of Mr. Marshall was offered, no evidence whatever had been presented to the Court that appellant believed he had a right to the transcript of proceedings before the Court of Inquiry. In the absence of such evidence, the testimony of Mr. Marshall as to any information given appellant could only serve to confuse the jury and lead them to believe that appellant *in fact had a legal right to obtain a copy of the transcript.* A judge has discretion to rule out even relevant evidence if it is not cogent and is more likely to distract than inform the jury.

Schindler v. United States, supra;
Randle v. United States, supra.

Since the testimony of Mr. Marshall had no probative value to establish appellant's state of mind, it could

only have been offered for the purpose of proving the truth of its contents, namely, that appellant in fact had a legal right to obtain a copy of the transcript. As such, the testimony was not only hearsay, but would have permitted the introduction in evidence of self-serving declarations made by appellant himself. (*Shreve v. United States,* 103 F. 2d 796 (C. C. A. 9, 1939) cert. den. 308 U. S. 570; *Lane v. United States,* 142 F. 2d 249 (C. C. A. 9, 1944).) Moreover, this testimony would have encroached upon the function of the trial court in passing upon questions of law. (*Bayless v. United States,* 200 F. 2d 113, 115 (C. A. 9, 1952), cert. den. 345 U. S. 929; *Meyers v. United States,* 174 F. 2d 329, 335 (C. A. 8, 1949), cert. den. 338 U. S. 849.) The fact that the District Court did not exclude the offered testimony upon all of the grounds discussed above will not prevent this court from sustaining the lower court's ruling if there were any grounds upon which exclusion was proper.

Wagner v. United States, 67 F. 2d 656 (C. C. A. 9, 1933);

Kalloch v. Hoagland, 239 Fed. 252, 255 (C. C. A. 6, 1917).

(c) The Court Did Not Err in Excluding Testimony of Appellant Concerning a Conversation Between Him and Mr. Marshall.

Appellant seems to complain of the exclusion by the court of testimony of appellant concerning a purported conversation between him and Mr. Marshall [R. Tr. 312]. No offer of proof was made as to the exclusion of this testimony, and it may well be doubted whether the objection is properly before this Court.

Elder v. United States, 202 F. 2d 465, 467 (C. A. 9, 1953), cert. den. 345 U. S. 999.

Assuming, however, that the exclusion may now be complained of, it does not constitute error. This testimony, too, would only be relevant to establish appellant's belief, and as previously discussed, appellant did not rely upon information received from Mr. Marshall in forming his alleged belief. Any testimony of appellant as to a conversation between him and Mr. Marshall could only have been offered to prove the truth of its contents, and as such would be hearsay and permit the introduction of self-serving declarations made by appellant during such conversation.

Shreve v. United States, supra;

Lane v. United States, supra.

(d) The Exclusion of the Evidence Complained of, Even If Error, Was Not Prejudicial.

Appellant was not prevented from introducing evidence to establish absence of motive. Appellant was permitted to testify that on the 10th of December, 1952 he had an opinion as to whether he would or would not be entitled to a transcript of the proceedings before the Court of Inquiry [R. Tr. 316-317]; that his opinion as a lawyer was that he had an absolute right not only to read, inspect and copy the transcript and the full record of the Court of Inquiry, but also to be furnished free of charge by the Government, a copy of the whole thing; that he had a conference with his attorney in which the matter was discussed [R. Tr. 317].

Appellant was further permitted to testify that he had knowledge of the fact that the transcript of his testimony before the Court of Inquiry had been forwarded to the office of the United States Attorney; that he received information on December 12 that the transcript

was being forwarded; that he knew this record had been made available for inspection by his attorney, Mr. Marshall; that Mr. Marshall had told him so; that he received this information from his lawyer on either the 15th or 16th [R. Tr. 318-319].

Appellant thus had ample opportunity to establish absence of motive; therefore, even if it be assumed that the exclusion of the evidence complained of was erroneous, it was not prejudicial. A judgment of conviction will not be reversed merely because a technical error may have been committed.

Rule 52(a), Federal Rules of Criminal Procedure, 18 U. S. C. A.;

Zamloch v. United States, 193 F. 2d 889, 892 (C. A. 9, 1952), cert. den. 343 U. S. 934.

4. The Trial Court Properly Refused the Instructions Proposed by Appellant as to Appellant's Legal Rights to Obtain a Copy of the Transcript of the Court of Inquiry. The Instruction Given by the Court on This Subject Was More Favorable Than That to Which Appellant Was Entitled.

(a) The Trial Court Properly Refused the Instructions Proposed by Appellant.

That appellant was entitled to an instruction defining his legal rights to obtain a copy of the transcript of proceedings before the Court of Inquiry is extremely doubtful. It was appellant's *belief as to his legal rights,* and *not his actual legal rights,* which was relevant as tending to show that appellant probably did not commit the crimes charged. Defining appellant's actual legal rights would tend to confuse the jury and lead them to believe that his guilt or innocence depended upon such rights. Appellant's actual legal rights were so remote

from the primary issues in the case, that numerous instructions pertaining to military law and regulations would have served only to add emphasis to appellant's theory of the case. Where an instruction seeks to add emphasis to an evidentiary fact or is misleading, it may properly be refused.

> *United States v. Sylvanus,* 192 F. 2d 96, 109 (C. A. 7, 1951), cert. den. 342 U. S. 943.

Assuming, however, that appellant was entitled to an instruction on the subject, those instructions proposed by him were properly rejected. The first prerequisite of an instruction is that it should correctly state the law. (*Pine v. United States,* 135 F. 2d 353 (C. A. 5, 1953), cert. den. 320 U. S. 740; *Timell v. United States,* 5 F. 2d 901, 902 (C. C. A. 9, 1925); 12 Cyclopedia of Federal Procedure, §48.228.) The instructions proposed by appellant did not fulfill this requirement. Appellant proposed an instruction which provided:

> "The Court instructs you that in determining whether or not Defendant Shibley had a motive for the commission of the offenses charged against him, you may take into consideration that the Court of Inquiry was a *court of the United States* and before December 19, 1952, the record of said Court of Inquiry was a *public record.* Furthermore, you are instructed that Defendant Shibley as a member of the general public was *entitled as a matter of law, to inspect the record* of the Court of Inquiry proceedings *before December 19, 1952*" [Prop. Inst. No. ....., C. Tr. 72]. (Emphasis added.)

The foregoing instruction is erroneous in that a Court of Inquiry is not a judicial, but an investigative body; the record of its proceedings are not open to public in-

spection, but have been made privileged and confidential by regulation; and appellant, either as an individual or as a member of the general public, did not have a legal right to inspect the record of its proceedings.

The function of courts of inquiry is to ascertain facts for the information of superior authority, and it has been likened to that of the civilian grand jury. (8 Opinions, Attorney General, 335, 347, 349 (1857).) Although by statute courts of inquiry have been granted power to summon witnesses and to make findings of fact (Article 135, Uniform Code of Military Justice, 64 Stat. 143, 50 U. S. C. A., §731), their duties are investigative and not judicial in nature.

United States v. Shibley, 112 Fed. Supp. 734, 743, 747 (D. C. S. D. Calif., 1953);

The Wright, 2 Fed. Supp. 43 (D. C., E. D. N. Y., 1932);

25 Opinions, Attorney General, 623, 625 (1906);

6 C. J. S., Army and Navy, 48-50.

In Winthrop's Military Law and Precedents, Second Edition (Reprint 1920), the nature of a Court of Inquiry is described as follows (p. 517):

> "The Court of Inquiry, so called, is really not a court at all. No criminal issue is formed before it, it arraigns no prisoner, receives no plea, makes no finding of guilt or innocence, awards no punishment. Its proceedings are not a trial, nor is its opinion (when it expresses one), a judgment. It does not administer justice, and is not sworn to do so, but simply to 'examine and inquire.'"

And in *United States v. Shibley, supra,* Judge Yankwich observed (747):

> "A Court of Inquiry does not exercise judicial function. It can only express opinions *when requested to do so,* and make findings of fact. It cannot punish anyone, least of all a civilian witness * * *." (Emphasis that of the court.)

Nor are records of proceedings before Courts of Inquiry open for inspection by the general public. Even in the absence of regulation, the very nature of these bodies would preclude the indiscriminate disclosure of their records. Courts of Inquiry investigate a variety of matters pertaining to the military establishment. Their proceedings may adversely affect the reputation of persons who have never been placed on trial. Records of their proceedings oftentimes contain information which in the best interests of national security should not be disclosed. Certainly, the records of the formal investigative bodies of the armed forces should not become public property.

The confidential nature of these records, however, was not left to inference. Section 3 of the Act of June 11, 1946, 60 Stat. 238, 5 U. S. C. A., §1002 (commonly referred to as the Administrative Procedure Act), which provides for the inspection of certain records and documents, specifically excepts those required for good cause to be held confidential. In accordance with this exception, and pursuant to authority conferred upon him by Section 161 of the Revised Statutes of the United States, 5 U. S. C. A., §22, the Secretary of the Navy promulgated a regulation which specifically made records of proceedings before Courts of Inquiry confidential. This regulation (32 C. F. R., §701.2(b), 16 F. R. 12505) provides:

"(b) The records of proceedings of Navy courts-martial, *courts of inquiry,* boards of investigations and administrative reports are *intended solely for use in the Naval Establishment* and are *privileged.* Such records or documents are *confidential for good cause found,* within the meaning of the Administrative Procedure Act. The Secretary of the Navy, or his designee, *may* make such records or information therefrom available to persons properly and directly concerned whether or not litigation is involved." (Emphasis added.)

The above-quoted regulation has the force and effect of law (*A., T. & S. F. Ry. v. Scarlett,* 300 U. S. 471 (1937), and appellant was bound thereby. Even if appellant could be construed as a person "properly and directly concerned" with the record of the Court of Inquiry Proceedings, he did not have a right, as a matter of law, to inspect or copy this record. The release of these records or information therefrom was discretionary with the Secretary of the Navy or his designee.

Indeed, in his Opening Brief, appellant seems to have abandoned the premise that records of courts of inquiry are public records. He now seems to contend that appellant would have been entitled to a copy of the record as a result of contempt proceedings instituted against him. Contempt proceedings, however, were *not commenced against appellant until January 28, 1953* (see, *United States v. Shibley,* 112 Fed. Supp. 734, at 738; and also, App. Op. Br. p. 31); while appellant's proposed instructions asked that his legal rights be defined as of December 19, 1952.

In defining appellant's legal rights as of December 19, 1952, the trial court was not required to assume that

certain events would subsequently transpire: that the United States Attorney would decide in favor of instituting contempt proceedings against appellant; that an information would be filed on January 28, 1953; and that as a result thereof a trial would take place. *Even appellant himself testified that he did not believe the contempt information would be filed* [R. Tr. 340].

Other instructions proposed by appellant were equally erroneous as the one quoted above. Appellant's No. 19 [C. Tr. 71] is incorrect since it states that appellant as a matter of law had a right to inspect the record or a copy thereof prior to December 19, 1952. As previously discussed, appellant had no such legal right. Appellant's No. 20 [C. Tr. 73] is incorrect for the same reason.

Appellant proposed another instruction which provided:

> "You are instructed as a matter of law that *if you conclude that the Court of Inquiry in question was a Court of the United States,* the record of its proceedings was a public record before December 19, 1952" [C. Tr. 74]. (Emphasis added.)

The above quoted instruction is in error because it imposes upon the jury the duty of deciding whether the Court of Inquiry was a Court of the United States. This is a question of law within the exclusive province of the Court. (*Corson v. United States,* 147 F. 2d 437, 438 (C. C. A. 9, 1944).) Appellant's No. 24 [C. Tr. 75] was objectionable for the same reason.

Appellant's No. 21 [C. Tr. 76], relating to issuance of a letter of censure, was likewise erroneous. Under Sec-

tion 0314 c. (3) of the Naval Supplement to the Manual for Courts-Martial, 1951, cited by appellant in support of this instruction, a letter of censure constitutes non-judicial punishment under Article 15 of the Uniform Code of Military Justice, 64 Stat. 112, 50 U. S. C. A., §571. Article 15 provides for punishment of military personnel, and not civilians. The record contains no evidence that appellant, a civilian, was a person subject to punishment by military authorities. (See Article 2, Uniform Code of Military Justice, 64 Stat. 109, 50 U. S. C. A., §552, for persons subject to the Code; *Ex parte Drainer,* 65 Fed. Supp. 410 (D. C., N. D. Calif., 1946), affirmed *sub. nom. Gould v. Drainer,* 158 F. 2d 981 (C. C. A. 9, 1947); *Ex parte Wilson,* 33 F. 2d 214 (D. C., E. D. Va., 1929); *United States v. MacDonald,* 265 F. 695 (D. C., E. D. N. Y., 1920); Winthrop's Military Law and Precedents, 2d Ed. (Reprint 1920), p. 89.)

(b) The Instruction Given by the Trial Court Was More Favorable Than That to Which Appellant Was Entitled.

Appellant seems to refer disparagingly to the fact that the trial court "simply improvised his own instruction" (App. Br. p. 103). There is no requirement that the court employ language proposed by counsel in formulating his charge. The trial judge is free to prepare his own instructions. (*Wright v. United States,* 175 F. 2d 384, 388 (C. A. 8, 1949), cert. den. 338 U. S. 873.)

The instruction given by the court below [R. Tr. 476] was more than fair to appellant. As previously discussed in (a) above, the Court was not required to speculate as

to future occurrences in order to define appellant's legal rights as of December 19, 1952. The Court could have instructed the jury that as of December 19, 1952, appellant had no legal right to obtain a copy of the transcript of proceedings before the Court of Inquiry. The Court could have instructed the jury that as of December 19, 1952, appellant's legal right to obtain a copy of the transcript in the future was not certain, but would depend upon future events which were not bound to occur at the time of the offenses charged. Yet, in deference to appellant's own theory of defense, the court instructed the jury that appellant would eventually be entitled to receive the transcript of the Court of Inquiry proceedings affecting him. This instruction was more favorable than that to which appellant was entitled. Where an error in an instruction is favorable to appellant, it cannot be relied upon for reversal. (*Stevens v. United States,* 206 F. 2d 64 (C. A. 6, 1953).)

The trial court properly directed the jury that they were not to conclude from the fact that appellant would eventually he entitled to the record that he would be entitled to unlawfully remove or conspire to remove said record from the Marine Base. Such a conclusion was likely to be drawn by laymen, unfamiliar with matters of law; and it was the duty of the trial judge to see that the evidence was viewed in proper perspective.

5. The Exclusion of the Reputation Evidence Was Not Error. The Summation of the Prosecutor Was Not Prejudicial. There Was No Coercion of the Jury Verdict. No Illegal Sentence Was Imposed. Defendant Had a Fair Trial and Was Not Deprived of His Liberty Without Due Process of Law.

(a) The Court Did Not Err in Striking the Testimony of Appellant's Witness as to the Bad Reputation of Thompson in the Community.

To more fully understand the basis for the court's ruling in striking this evidence in its entirety, pertinent portions of the testimony of witness J. W. Worley are herein set forth [R. Tr. 351-354]:

> Q. Captain Worley, do you know what Mr. Charles Thompson's reputation was in the City of Long Beach during the years 1952 and 1953, for truth, honesty and integrity? You can answer that "Yes," or "no."
>
> Mr. Bowler: Objected to, your Honor, on the ground there is no proper foundation laid, no proper foundation has been laid thus far for the question or the answer. It is the general reputation.
>
> The Court: I think you had better tell the witness what "reputation" means if he doesn't already know. It isn't what he thinks of him, it is what the public thinks of him.
>
> Q. By Mr. Ball: And how long did he work for you? A. About ten months.
>
> Q. From what dates? A. I employed him on July 11, 1952 and he disappeared on May 6, 1953.
>
> Q. Was that the end of his employment? A. That is right.

Q. Now, have you—do you understand what I am talking about when I use the term "reputation"? A. I do.

Q. And you know that Rusty Thompson lived in Long Beach during that period, do you, that he worked for you? A. Yes, I do.

Q. The ten month period? A. That is right.

Q. Have you talked to any people about him since then? A. Yes, I have talked to a lot of people.

Q. You needn't tell whom you talked with—simply tell me whether you have. A. I have.

Q. And have you discussed his reputation with various people in the community? Answer that "Yes," or "No." A. Yes.

Q. Now, do you know at this time what his reputation was in Long Beach in that period, 1952 to 1953, for truth, honesty and integrity? Just a minute—answer "Yes," or "No," whether you know. A. Yes.

Q. What was it—was it good or bad? A. Very bad.

Q. Would you believe him under oath? A. I sure would not.

Mr. Ball: You may cross-examine.

The Court: You employed him for ten months and he left voluntarily, didn't he?

The Witness: He ducked out, yes.

The Court: You ran a detective agency in the State of California?

The Witness: I did.

The Court: And employed that kind of a man?

The Witness: *I didn't know he was that kind of a man until he got into this mess here, and he stole a lot of money from me and a lot of other people's in Long Beach.*

The Court: This case wouldn't help anybody's reputation, would it?

The Witness: I wouldn't think so, no. It surely didn't do me any good although I didn't know anything about it.

Cross-Examination

By Mr. Bowler:

Q. You are giving us your own personal opinion here today? A. Yes, what I know of Mr. Thompson.

Q. It is your own personal opinion of Mr. Thompson? A. Yes, sir.

Mr. Bowler: I ask that his entire testimony be stricken, your Honor, on the ground it is not proper character evidence. He is giving his own personal opinion and not reputation evidence, and I ask that the jury be admonished to disregard his entire testimony.

The Court: And the motion will be granted. (Emphasis added.)

After this ruling there followed a colloquy between Court and counsel as follows [R. Tr. 356, 357]:

The Court: May I interrupt for just a moment? He said he employed him up until May of this year and he didn't know anything about his reputation until since then?

Mr. Ball: He found out about it later.

The Court: That is, after the happening of this event?

Mr. Ball: Yes.

The Court: You can't truthfully say that a man's reputation is good after an indictment; but we are only interested in his reputation up to the time the man was accused of an offense.

Mr. Ball: But he said he talked to other people since, and there were a lot of other facts that came

to his attention since he left, that gave him that opinion.

The Court: I am going to strike it, counsel, and instruct the jury to disregard it. I think anybody's reputation after they have been indicted by a grand jury is subject to question; at least I would question such a man's reputation.

It is apparent that one basis for the court's ruling is to be found in that portion of the testimony above quoted, wherein witness Worley had finished testifying that he knew Thompson's reputation in Long Beach in the period from 1952 to 1953 to be very bad, and the court then questioned witness Worley's employment of "that kind of a man" in his detective agency, to which Worley responded with the statement emphasized above, that he didn't find out about Thompson until after "this mess here," indicating that his information came to him after Thompson was indicted.

The court's inquisitive question giving rise to this startling response placed witness Worley squarely in the position where he either had to admit employing in his detective agency an individual whose reputation in the community he knew to be very bad, and indeed so bad he wouldn't believe him under oath, *or* destroy himself as a reputation witness by admitting clearly and unequivocally that he (Worley) didn't know that he (Thompson) was "that kind of man," until he "got into this mess here." He chose the latter.

Rusty Thompson whose reputation was being assailed was a party to the controversy. He was a co-defendant with appellant and had previously entered a plea of guilty to the indictment which was published June 25, 1953 [C. Tr. 2].

With reference to this subject of subsequent reputation testimony the court's attention is respectfully invited to *Wigmore, Evidence* (3d Ed.), Volume V, §1618 at page 492, wherein the learned author clearly states the rule:

> "Where the desired character is that of a party—for example, the defendant in a criminal charge * * * it is obvious that after the charge has become a matter of public discussion and partisan feeling on either side has had an opportunity to produce an effect, a false reputation is likely to be created * * *. The safeguards of trustfulness are lacking. Accordingly, it is generally agreed that a reputation at any time after a charge is published or other controversy begun is not admissible."

See:

Spurr v. United States, 87 Fed. 701 (6 Cir., 1898).

The court's ruling striking this testimony should be sustained upon still another ground, namely, that Worley gave his individual opinion based upon his own personal observations rather than community reputation. The basis for the court's ruling is found in the same statement by Worley, again set forth for the court's consideration [R. Tr. 354]:

> "The Court: And employed that kind of man?
> The Witness: I didn't know he was that kind of man until he got into this mess here, and he stole a lot of money from me and a lot of other people's in Long Beach."

It is clear that Worley based his opinion not on community reputation but on his own knowledge of the indictment and specific acts of stealing.

The leading case on this subject is *Michelson v. United States,* 335 U. S. 469, 477, wherein the Supreme Court stated it thusly:

> "Not only is he permitted to call witnesses to testify from hearsay but, indeed, such a witness is not allowed to base his testimony on anything but hearsay. What commonly is called 'character evidence' is only such when 'character' is employed as a synonym for 'reputation.' *The witness may not testify about defendant's specific acts or courses of conduct, or his possession of a particular disposition as of benign mental or moral traits; nor can he testify that his own acquaintance, observation and knowledge of defendant leads to his own independent opinion that defendant possessed a good, general or specific character inconsistent with the commission of acts charged.*" (Emphasis added.)

This entire matter of reputation evidence is one in which the courts of last resort have invested the trial courts with wide discretionary powers in dealing with this type of evidence. On this subject the Supreme Court in the *Michelson* case, *supra,* stated at page 480:

> "Both proprietary and abuse of hearsay reputation testimony, on both sides, depends on numerous and subtle considerations difficult to detect or appraise from a cold record and therefore rarely and only on clear showing of prejudicial abuse of discretion will courts of appeal disturb rulings of trial courts on this subject."

(b) The Summation of the Prosecutor Was Not an Appeal to Passion and Prejudice for the Purpose of Overcoming the Dispassionate Judgment of the Jury.

Remarks of government counsel when viewed in their proper relationship to the evidence did not prejudice the appellant. The evidence disclosed the situs of the crime to be a government echelon [Govt. Exs. 1, 2, 3, 4].

The conspiracy had as one of its objectives the entering of a governmental installation for the purpose of committing larceny [C. Tr. 2]. Such acts, to go unpunished, are in truth and in fact a threat to our security and the article taken, whether it be a lead pencil or an atom secret, does not alter the principle involved. Furthermore, no objection was made during or following the prosecutor's argument, nor was the court requested to admonish the jury as to its force.

Reference is made to the often quoted Supreme Court case covering the subject-matter of failing to object to alleged impropriety, *United States v. Socony-Vacuum Oil Company,* 310 U. S. 150, wherein there is a rather full treatment of this proposition of law commencing at page 237. We quote from pages 238-239, as follows:

> "In the first place, counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial."

The courts are generally to the same effect:

Allen v. United States (C. A. 5, 1951), 192 F. 2d 570;

Heald v. United States (C. A. 10, 1949), 175 F. 2d 878, 882;

Vendetti v. United States (9 Cir., 1930), 45 F. 2d 543;

Pacman v. United States (9 Cir., 1944), 144 F. 2d 562.

(c) The Conduct and Statements of the Trial Court Did Not Coerce the Verdict of the Jury and Did Not Constitute Error.

The jury had returned for an explanation of certain instructions [R. Tr. 561]. Pursuant to their request the court re-read the instructions on the law of conspiracy [R. Tr. 562-567]. The court then gave the instruction complained about, as follows [R. Tr. 568-570]:[2]

> "The Court: Yes, ladies and gentlemen, this is an important case. The trial has been long and expensive. Your failure to agree upon a verdict will necessitate another trial equally as expensive. The court is of the opinion that the case cannot be tried better or more exhaustively than it has been on either

---

[2]*Cf.* the Allis instruction (approved in the *Allen* case), *infra,* which was as follows:

> "This is an important case. The trial has been long and expensive. Your failure to agree upon a verdict will necessitate another trial equally as expensive. The Court is of the opinion that the case cannot be again tried better or more exhaustively than it has been on either side. It is therefore very desirable that you should agree upon a verdict. The court does not desire any juror should surrender his conscientious convictions. On the other hand, each juror should perform his duty conscientiously and honestly, according to the law and the evidence. And, although the verdict, to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusions of his fellows, yet, in order to bring the 12 minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided, that you are selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to 12 men more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on one side or the other. In the present case the burden of proof is on the United States to establish its case beyond a reasonable doubt, and if, upon any count of the indictment submitted to you, you have a reasonable doubt,

side. It is therefore very desirable that you should agree upon a verdict. The court does not desire that any juror should surrender his conscientious convictions. On the other hand, each juror should perform his duty conscientiously and honestly according to the law and evidence, and, although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusions of his fellows, yet, in order to bring 12 minds to a unanimous result you must examine the questions submitted to you with candor and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided, that you are selected in the same manner and from the same source from which any future

---

based upon the evidence, of the guilt of the defendant, you ought to acquit him on that count. But, in conferring together, you ought to pay proper respect to each other's arguments. And, on the one hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably, and ought not to, doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows. In order to acquit the defendant of the 17 charges submitted to you, you must consider all of them, and find that he is not guilty of any of them. On the other hand, if you find that he is guilty of any one of them, you should return a verdict of guilty. You may conduct your deliberations as you choose, but I suggest that you now retire and carefully consider again the evidence relating to a few counts, for instance the fourteenth and fifteenth, or the eighth and ninth, and to call your attention to them more clearly I will again read to you that portion of the charge relating to the claims of the parties concerning these four counts."

jury may be and there is no reason to suppose that the case will ever be submitted to 12 men and women more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on one side or the other.

In the present case the burden of proof is on the United States to establish its case beyond a reasonable doubt and if, upon any count of the indictment submitted to you, you have a reasonable doubt, based upon the evidence, of the guilt of the defendant, you ought to acquit him on that count. But, in conferring together, you ought to pay proper respect to each other's opinions, with a disposition to be convinced by each other's arguments. And, on the other hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath.

And on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably, and ought not to, doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows."

Then the following colloquy took place [R. Tr. 571, 572]:

"Mr. Ball: We make an exception to the last instruction upon the ground that the defendant is entitled to the individual opinion of each and every juror.

The Court: I think I said that in my instruction. Of course, this does not supplement the other instruction given you ladies and gentlemen. You must bear in mind all of the other instructions that I have given you. I am simply, in this case, trying to follow the language of the United States Court in *Allen v. United States.*

Mr. Ball: Also, on the ground that no matter what time the jury is out—in other words, the elapse of time is immaterial. Any juror is entitled to maintain his conviction.

The Court: I don't want any juror to surrender his honest conviction under any circumstances.

Mr. Ball: That is right, every juror must maintain his honest conviction, no matter what time elapses.

The Court: I don't want anybody to surrender their honest conviction under any circumstances but, however, that is your problem. I might say that I will be here until noon and after that time I am going to return home. And I think counsel will also want to be on their way. They can assemble in about an hour or so on notice, any time between now and tomorrow evening.

Mr. Bowler: That is right.

Mr. Ball: Well, your Honor, I am in this position—that no sacrifice of time will make any difference to me. I will be here at the disposal of my client no matter when it is, to properly defend him and see that he is properly defended.

The Court: Well, we are all in the same boat, gentlemen, counsel on both sides and the court. We are at the mercy of the jury."

In giving the supplemental instruction the court followed a practice which has long been approved and held proper by federal courts.

Allis v. United States (C. C., E. D. Kan., 1893), 73 Fed. 165, aff. 155 U. S. 117;

Allen v. United States, 164 U. S. 492;

Boehm v. United States (8 Cir., 1941), 123 F. 2d 791, 812, cert. den. 315 U. S. 800, rehear. den. 315 U. S. 828;

Suslak v. United States (9 Cir., 1914), 230 Fed. 913, 919;

Shea v. United States (9 Cir., 1919), 260 Fed. 807, 808;

Kawakita v. United States (C. A. 9, 1952), 190 F. 2d 506, aff. 342 U. S. 932.

In the *Boehm* case, *supra,* at page 812, the court approved the practice in the following language:

> "It was plainly the duty of the trial judge to seriously and earnestly impress upon the jury that they also had a sworn duty transcending personal inclination, to make true deliverance between the government and the accused. As the judge said nothing to tilt the scale in the jury's hands, either for or against the appellant, it cannot be said that he improperly coerced the verdict."

The complained of instruction is commonly known as the *"Allen"* instruction and has been approved in one form or another in every circuit where such instruction

has been challenged on appeal, when the court made no inquiry concerning the division of the jury.[3]

The charge given by the court in the case at bar, set out in full *supra,* reveals that the trial judge omitted but two portions of the charge given in the *Allis* case set out at length in footnote 2. He omitted two portions of the *"Allen"* instruction, one omission certainly not being harmful to appellant,[4] and the other clearly favorable:[5]

The Second Circuit Court in approving the use of the *"Allen"* charge in *United States v. Olweiss* (2 Cir., 1944), 138 F. 2d 798 at 801, *supra,* and quoted in *United States*

---

[3]*Boston & M. R.R. v. Stewart* (1 Cir., 1918), 254 Fed. 14 at 18; *United States v. Dunkel* (2 Cir., 1949), 173 F. 2d 506 at 508; *United States v. Olweiss* (2 Cir., 1944), 138, F. 2d 798; *Lias v. United States* (4 Cir., 1931), 51 F. 2d 215 at 218, aff. 284 U. S. 584; *Weathers v. United States* (5 Cir., 1942), 126 F. 2d 118; *Israel v. United States* (6 Cir., 1925), 3 Fed. 743 at 745; *Paschen v. United States* (7 Cir., 1934), 70 F. 2d 491 at 503; *Bowen v. United States* (8 Cir., 1946), 153 F. 2d 747; *Wright v. United States* (8 Cir., 1949), 175 F. 2d 384 at 388; *Shepherd v. United States* (9 Cir., 1916), 236 Fed. 73 at 78; *Shea v. United States* (9 Cir., 1919), 260 Fed. 807, *supra; Suslak v. United States* (9 Cir., 1940), 213 Fed. 913, *supra; Speak v. United States* (10 Cir., 1947), 161 F. 2d 562, 564; *Bord v. United States* (C. A., D. C., 1942), 133 F. 2d 313.

[4]"The court and the jury are here to come to a just and righteous result. No doubt you are as anxious to reach it as am I. So anxious is the court that, having spent now two weeks in the trial of this cause, I am willing to stay here another, if by that means we may be able to reach a just and proper result in this trial." (73 Fed. 1, 183.)

[5]"In order to acquit the defendant of the seventeen charges submitted to you, you must consider all of them, and find that he is not guilty of any of them. On the other hand, if you shall find that he is guilty of any of them, you shall return a verdict of guilty." (73 Fed. 1, 183.)

v. Dunkel (2 Cir., 1949), 173 F. 2d 506 at 508, *supra,* stated:

> "A jury which felt itself coerced by such language would have lacked all independence of mind; it would have been no better than a sounding board for any judicial whisper."

Appellant relies heavily on *Peterson v. United States,* 213 Fed. 920 (9 Cir., 1914), as authority for his contention that the supplemental instruction constitutes coercion. The very same contention was made in the *Kawakita* case, *supra,* where this court at page 527 disposed of it as follows:

> "While there is language in *Peterson v. United States* (9 Cir., 1914), 213 Fed. 920, which seems to support the appellant, the import of the language there used is fully explained in our later expression in *Shea v. United States* (9 Cir., 1919), 260 Fed. 807, which reviews the Supreme Court decision more fully."

In *United States v. Commerford* (2 Cir., 1933), 64 F. 2d 28 at 31, in considering the cases of *Peterson v. United States,* 213 Fed. 920; *Stewart v. United States,* 300 Fed. 769, and *Burton v. United States,* 196 U. S. 283, all of which cases are relied upon by appellant herein, the court stated:

> "In *Burton v. United States,* 196 U. S. 283; *Burger v. United States,* 62 F. 2d 438 (10 Cir.); *Stewart v. United States,* 300 Fed. 769 (8 Cir.), and *Peterson v. United States,* 213 Fed. 920 (9 Cir.), reversals of convictions were based upon improper inquiries addressed to the foreman concerning the division of the jurors. They are not relevant here."

Appellant further cites in support of his contention: *Edwards v. United States,* 7 F. 2d 598 (8 Cir., 1925); *Quong Duck v. United States,* 239 Fed. 563 (9 Cir., 1923); *Demetree v. United States,* 207 F. 2d 892 (C. A. 5, 1953), and *Henry v. United States,* 204 F. 2d 817 (C. A. 6, 1953). None of these cases disproves the instruction given in this case.

In addition to the *Allen* instruction, the appellant contends that certain other statements by the court hereinbefore set forth had a tendency to coerce the jury.

The jury had been out about twenty-four hours; it was the week-end, and the court had just given the *"Allen"* instruction and counsel for the appellant had entered an exception to it on the ground that defendant is entitled to the independent opinion of each and every juror [R. Tr. 571]; the court then reiterated, "I don't want any juror to surrender his honest conviction under any circumstances" [R. Tr. 571], and then immediately followed the remarks which appellant says were coercion [R. Tr. 572]:

> "The Court: I don't want anybody to surrender their honest conviction under any circumstances but, however, that is your problem. I might say that I will be here until Noon and after that time I am going to return home. And I think counsel will also want to be on their way. They can assemble again in about an hour or so on notice. anytime between now and tomorrow evening.
>
> Mr. Bowler: That is right.

Mr. Ball: Well, your Honor, I am in this position—that no sacrifice of time will make any difference to me. I will be here at the disposal of my client no matter when it is, to properly defend him and see that he is properly defended.

The Court: Well, we are all in the same boat, gentlemen, counsel on both sides and the court. We are at the mercy of the jury."

Appellant has distorted the import of these remarks all out of proportion when he states in his opening brief, page 130, commencing on line 18: "They were reminded that if they did not agree within the hour, the court and counsel would be gone and the jury might be compelled to stay together over the week-end." The jury were simply informed that, being a week-end and court not being in regular session, for them not to fear; that the court would convene on their notice within an hour, and when the court further said, "We are all in the same boat, gentlemen, counsel on both sides and the court, we are at the mercy of the jury," it meant,—and one cannot reasonably infer anything different,—that even though it is a week-end and the court is not in regular session, counsel on both sides and the court are all subject to the jury's call and will convene on notice within the hour.

(d) The Sentence of the Trial Court on the Conspiracy Count Was Legal.

The jury failed to return a verdict on the substantive count of burglary [R. Tr. 573] but, assuming for the purpose of argument that the jury had returned a verdict of acquittal on that count, the result would be nothing

more than a possible inconsistency in the verdict which has been repeatedly held in this circuit to be not fatal.[6]

In *Macklin v. United States,* cited in footnote 6, *supra,* (9 Cir.) 79 F. 2d 756, 758, which quotes with approval *Seiden v. United States* (2 Cir.), 16 F. 2d 197, as follows:

> "We have held that when a jury convicts upon one count and acquits upon another, the conviction will stand though there is no rational way to reconcile the two conflicting conclusions."

In *United States v. Dewinsky* (D. C. N. J., 1941), 41 Fed. Supp. 149, the court, in ruling on a comparable situation, had this to say at page 155:

> "Nor is the verdict of guilty on the conspiracy counts as to defendants Quick and Snover inconsistent with the not guilty verdicts on the substantive counts.
>
> These two defendants were liable on the substantive counts, if at all, by reason of the 'aiding and abetting' statute, 18 U. S. C. A. 550. That statute was read to the jury and explained to them. *The jury might well have found, as it did, that while the evidence brought Quick and Snover into a crime looking to the doing of the subsequent acts, it was not sufficiently strong to establish their participation therein as aiders and abettors.* There is ample testimony to support

---

[6]*Morrissey v. United States* (9 Cir., 1933), 67 F. 2d 267; *Macklin v. United States* (9 Cir. 1935), 79 F. 2d 756, 758; *Maugeri v. United States* (9 Cir., 1935), 80 F. 2d 199, 201; *Long v. United States* (9 Cir., 1937), 90 F. 2d 482; *Suetter v. United States* (9 Cir., 1944), 140 F. 2d 103; *McElheny v. United States* (9 Cir., 1944), 146 F. 2d 932; *Bridgeman v. United States* (C. A. 9, 1950), 183 F. 2d 750, 753; *United States v. Coplon* (C. A. 9, 1950), 185 F. 2d 629, 633; *United States v. Catrino* (C. A. 9, 1949), 176 F. 2d 884, 888; *Robinson v. United States* (C. A. 9, 1949), 175 F. 2d 4, 9.

the conviction on the conspiracy count alone and it is not inconsistent with reasonable doubt as to the other counts." (Emphasis added.)

Since the jury found the appellant guilty of conspiracy to commit a felony, the sentence of the court was legal.

The three cases cited by appellant in support of his contention add nothing to the solution of the problem, in that they are concerned with general principles of law with which there is no controversy.

Conclusion.

For the foregoing reasons the judgment should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,
MANLEY J. BOWLER,
Chief Assistant U. S. Attorney,
JAMES R. DOOLEY,
Assistant U. S. Attorney,
Attorneys for Appellee.